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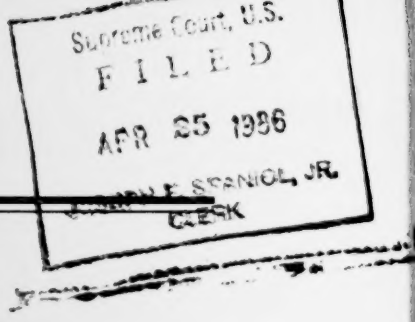

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

S/S SALVADOR, her engines, boilers, etc.,
and A/S Ivarans Rederi,

Petitioners,

—against—

BERISFORD METALS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals, in setting aside § 1304(5) of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*, and thus in holding inapplicable that Section's $500 per package limit of carrier's liability in the case of issuance of an erroneous on-board bill of lading, has given proper interpretation and effect to an Act whose language implements, virtually verbatim, an international convention to which, with many other maritime nations, the United States is a party?

Whether the Court of Appeals erred by depriving a carrier of its package limitation because the carrier inadvertently issued an erroneous on-board bill of lading?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The opinion of the United States District Court for the Southern District is not reported officially but is unofficially reported at 1986 A.M.C. 99. It is reproduced at page 19a of the Appendix. The Second Circuit opinion is reported at 779 F.2d 841, and is reproduced at page 1a of the Appendix. The denial of defendants' petition for rehearing dated January 27, 1986 is not reported, but is reproduced at page 24a of the Appendix.

JURISDICTION

The Second Circuit opinion, of which review is sought, was decided and entered on December 16, 1985. Defendants' petition for rehearing was denied on January 27, 1986. This petition was filed within ninety days of that date, and this court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The federal courts below had jurisdiction of this admiralty cause under 28 U.S.C. §§ 1333 and 1291.

TREATIES AND STATUTES INVOLVED

This case involves the "International Convention for the Unification of Certain Rules Relating to (Ocean) Bills of Lading (The Hague Rules)," June 29, 1937, 51 Stat. 233, T.S. 931, 120 L.N.T.S., reprinted at page 26a of the Appendix, and the United States statute which implements this convention, the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (1936), reprinted at page 37a of the Appendix.

STATEMENT OF THE CASE

Defendants' agent in Santos, Brazil received 100 bundles of tin ingots for carriage to the Port of New York. Defendants' agent loaded the bundles of tin ingots into four ocean containers as permitted by the bill of lading, and locked and sealed the containers. Defendants' agent transported the containers, which behaved as if they were loaded, not empty, to a Brazilian government controlled storage yard located near the loading dock. The government storage yard issued weight receipts which indicated that the correct cargo was in the containers. Approximately 24 hours after delivery to the government yard, the containers were loaded on board the vessel SALVADOR, and defendants' agent issued an on board bill of lading. When the vessel discharged the containers in New York, two of the four containers were found to be empty. Seventy bundles were

missing and were probably removed from the containers while the loaded, locked and sealed containers were stored for 24 hours in the government storage yard.

The district court awarded summary judgment to plaintiff, but limited defendants' liability to $500 per package, or $35,000, pursuant to the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1304(5). The Court of Appeals for the Second Circuit reversed the district court on the limitation issue, and remanded for entry of unlimited damages, $483,214.90.

Petitioners do not contest the liability issue on this appeal; they raise the limitation issue only.

I. THE COURT BELOW ERRED IN DENYING EFFECT TO THE MONETARY LIMITATION ON DAMAGES SET BY A STATUTE (The Carriage of Goods by Sea Act)[1] THAT IMPLEMENTS VERBATIM AN INTERNATIONAL AGREEMENT.

All the defects of the judgment below stem from one radical error: The Court of Appeals failed to give effect to the plain meaning of treaty[2] language (repeated verbatim in "COGSA") that fixed a monetary limit per package on carriers' liability. Where many nations, with many differing legal concepts and methods, seek world-wide uniformity in some part of law, *by and only by* agreeing on a *text*, then faithful adherence by national courts to the plain meaning of that text is the *only* way to approximate this desired uniformity.[3] Displacement of

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1 46 U.S.C §§ 1300, *et seq.*, hereinafter "COGSA."

2 "Treaty" herein refers generically to all international compacts. The treaty underlying COGSA is called the "International Convention For The *Unification* of Certain Rules of Law Relating to (Ocean) Bills of Lading" (Emphasis supplied). The United States ratified this 1924 Convention on June 29, 1937.

3 The circuit courts of the United States have not even agreed on the meaning of COGSA. For a discussion of inter-circuit conflict, see page

such textual language (as here) by forum-devised doctrines practically contradictory to the agreed text—doctrines devised for dealing with domestic law only, as to which no purpose of international uniformity exists—puts at high risk the uniformity sought by the signatories. These considerations ought to generate a principle of construction: Where the words of COGSA, in themselves, have an intelligible meaning, the rule stated by that meaning should be adhered to.

This Court has laid down a general rule of treaty construction:

> This court is bound to give effect to the stipulation of the treaty, in the manner and to the extent which the parties have declared and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice.

Amiable Isabella, 19 U.S. 1, 32-33 (1821).

Similarly, the Ninth Circuit has stated:

> We are constrained to look within the four corners of the Treaty keeping in mind the purpose of the contracting parties. Any resort to domestic law must be derived from the express terms of the Treaty itself.

American Trust Co. v. Smyth, 347 F.2d 249, 153 (9th Cir. 1957).

These and many similar expressions apply with fullest strength to treaty language that is to become part of the private law of the signatory countries; the desired uniformity of expectation and of result as to certain private-law matters cannot be had when the treaty language is displaced or disregarded.

11, *infra*. In fact, as of March 19, 1986, there appears to be a conflict within the Second Circuit Court of Appeals with reference to unreasonable deviation. See *infra* at 15-16.

In a thorough article, R.J.C. Munday, *The Uniform Interpretation of International Conventions*, 27 International and Comparative Law Quarterly 450 (1978), the author concludes:

> The more closely courts adhere to the ordinary and natural meaning of the words of the agreed text, the less opportunity there will be for wide divergences in their construction at home and abroad.

Id. at 458.

The present case concerns nothing but a typical contract for the carriage of goods. COGSA provides:

> Neither the carrier nor the ship shall in *any event be or become liable for any loss or damage to or in connection with the transportation of goods* in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, *unless* the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C. § 1304(5) (emphasis supplied).

In the face of this language, sweeping and clear, the court below has treated COGSA § 1304(5) as "ousted", and ordered a judgment for some fifteen times the package limitation.

This paradoxical decision caps a long development having two related aspects: First, literal geographical "deviation" was held to "oust" limitation of liability. Secondly, various faults of the carrier were held to be so similar to literal "deviation" that this effect of "deviation" should be attached to them, whether under the name of "quasi-deviation" or under some other name of identical effect. *Both* these developments were of dubious rightness before COGSA. *Each* of them is wrong under COGSA. *Neither* of them has been approved by this Court since COGSA came into force in 1936.

Earlier cases, before or under the Harter Act, 46 U.S.C. §§ 190-196, *and thus before COGSA*, held that "deviation"—literal geographical departure from the contracted voyage—"ousted" the contract of carriage, including any contracted-for limitation of recoverable amount. It was sometimes said that the deviating carrier became an "insurer" of the cargo. By 1936, when COGSA superseded the Harter Act in foreign trade, a treaty and statute, not just a private contract, limited the recoverable amount "in any event." The pre-COGSA deviation rule, even as to literal geographic deviation, was probably not justifiable anymore, because its only reasonable support was the fact that, in earlier times, cargo lost its own insurance when the ship deviated from the contracted voyage. With the coming of "held-covered" clauses in cargo insurance policies, this result no longer ensued on deviation.[4] However that may be, this problem should have been treated as very different under COGSA, with its internationally agreed-on text fixing all the principal liabilities of ship and cargo.

Yet, especially in the Second Circuit, the imperatives of construing and honoring such a text were not realized. An early COGSA case, *Jones v. The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953), though a district court decision, has been most influential. The court there held that deviation was to have the *same* drastic effect as *before* COGSA, on the ground that the language of COGSA was not clear or emphatic enough to lead to the conclusion that "Congress" had "intended" to change that law. But that was not only the wrong answer; it was an answer to the wrong question. It must be wrong to ask whether a text, meant to produce uniformity of outcome in the courts of Japan, Argentina, Sweden, and the United States,

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[4] It is extremely ironic that a rule concerning *real* deviation, a rule that in its own narrow terms has thus had its rational foundation eroded by expanded cargo insurance coverage, should form the basis for *analogic* reasoning that creates an open class of "quasi-deviational" faults that "oust", not the "contract" now, but a *statute* and its underlying *treaty*; yet that is what has happened, in this case and in those immediately ancestral to it. See *infra*, p. 11.

sufficiently evidences an *"intent" of the American Congress* to change some feature of the prior *United States* law. The question should rather have been, and should still be, "What is the most *natural* way (without any presumptions favoring antecedent peculiarities of the legal system either of the United States or of any other country) to take this *treaty* language, addressed as it is to *all* courts in the maritime world?" Yet *Jones v. The Flying Clipper* is still of power in the Second Circuit;[5] it is cited twice, in very important places, in the opinion in this very case. *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 847, 848, Appendix 1a, 15a, 17a (2d Cir. 1985).

But if one freshly approaches COGSA, holding in mind the *international origin and goal* of its text, how can one conclude that COGSA leaves standing a rule that the package limitation is lost by deviation? The language of § 1304(5), quoted *supra*, must have been written with the very thought in mind of answering negatively all such questions as this. Section 1304(5) declares the $500 package limitation applicable *"in any event,"* and goes beyond literal "loss or damage" *to* the goods, to sweep in, by a more general phrase, "loss or damage . . . *in connection with the transportation of* the goods". There is no way that the facts of the present case can be seen as outside the coverage of that phrase. The shipper is given a clear chance of providing for a greater recovery, by declaring the value of the goods before their delivery to the carrier, and by insertion of this value in the bill of lading—with the consequence that a higher freight will probably have to be paid. Tellingly, COGSA § 1304(5), which lays out the per-package limitation, *immediately follows* § 1304(4), which defines and deals with the *substance of deviation*; how could this collocation have occurred, and been read over time and again in the drafting process, if the words "in any event", § 1304(5) *supra*, were thought not to apply "in the event" of deviation?

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5 It was followed substantially in *Encyclopedia Brittanica v. Hong Kong Producer*, 422 F.2d 7, 18 (2d Cir. 1969). As to conflict among Circuits, see discussion at p. 11-12, *infra*.

Blending with and supplementing the theory that literal geographic deviation "ousts" the exceptions and the monetary limitation normally applicable, there has gradually been confirmed and expanded (not without hesitations) a doctrine at odds with obvious etymology, and with not much support besides ingenious use of metaphor, that says that certain kinds of carrier misconduct are so "fundamental" as to amount to "deviation", or to something enough like deviation to be given the drastic effect of real deviation—that is to say, "ouster" of the contract, or even, as in this case, of a *statute* and of a *treaty*. It is handy to call this doctrine "quasi-deviation" (a term that figures several times in the opinion of the court below in this case). But what is essential is that, whether this not-really-deviational conduct is called "deviation", or "quasi-deviation", or "fundamental breach", or even whether a new terminology of "warranty" is adopted, as in the opinion below in this case,[6] it is all one thing: Certain conduct is picked out as so serious a breach of carrier's obligation as to "oust" not just a *contract* anymore, but, under COGSA, a *statute* as well, and with it a *treaty*. That is a lot of "ouster".

This doctrine (or set of identically operative doctrines) originated in connection with on-deck stowage of cargo, and has radiated out from this center, as in this case. It was not and is not obvious that deck stowage (or any later-devised "quasi-deviations"), should be separated from all other faults for especially drastic treatment. Some of the principal maritime nations do not have such a doctrine. But at all events the picture should have changed under COGSA; the new position should have been seen as ruled by COGSA's text naturally interpreted, rather than by addressing that text with the question whether it showed with strongest clarity the "intent" of the *American* Congress to change the earlier *American* law. COGSA, so naturally interpreted, allows no room for equating one or more nondeviating actions—deck stowage or anything

6 The court below recognizes the possibility of these terminological variations, treating them as what they are—merely different ways of saying the same thing. 779 F.2d at 846, Appendix at 20a.

else—with deviation itself. COGSA covers deviation in these words:

> Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *provided however*, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, be regarded as unreasonable.

46 U.S.C. § 1304(4)

This section seems to be referring to geographical "deviation"; it is hard to imagine deck stowage (for example) as being instrumental to saving life or property, or to loading or unloading cargo or passengers; it is obvious that real deviation was at the focus.[7] If draftsmen had wanted radically to extend the scope of "deviation", this would have been the point at which to say so. This very silence of COGSA is strongly persuasive; it is to the last degree unlikely that so symmetrical and carefully wrought a consolidation of goods-carriage law would not have spelled out so drastic a rule as the one applied in this and similar cases, if the draftsmen had intended that such a doctrine was to play a part in the COGSA regime. Of

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7 Very significantly, the "official" text, in French, underlying COGSA, has "deroutement" for "deviation." No wonder France seems to have no doctrine of "quasi-deviation". This official text is available for resolving any ambiguities. See *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 1 Lloyd's L.R. 321, 330. Under the German law, it appears that the liability of the carrier is strictly limited in cases of unjustifiable deviation or any breach of contract, and even of gross negligence, to a fixed sum per package (approximately the equivalent of $500). Prüssman-Rabe, Seehandelsrecht §§ 636a and 660 (2d ed. 1983); Schaps-Abraham, Das Seerecht in der Bundesrepublik Deutschland § 636a, No. 10 (4th ed. 1978); Hanseatisches OLG Hamburg, 230/56 (July 1, 1958), Monatasschrift für Deutsches Recht 923 (1958). It is to be noted that the German rule makes it unimportant whether a doctrine of quasi-deviation, or its equivalent, exists, since the package limitation applies anyway.

these "quasi-deviational" holdings (the present case, in all effect, being one), a modern treatise says, "It would seem unwise to extend analogically and by way of metaphor a doctrine of doubtful justice under modern conditions, of questionable status under COGSA, and of highly penal effect." Gilmore and Black, *The Law of Admiralty*, § 3-42, p. 183 (2d ed. 1975).

As to the "ousting" of the COGSA *monetary limitation*, either by real "deviation" or by "quasi-deviation", or by an absolutely equivalent doctrine under another name, one must spotlight a *specific radical contrast* between the earlier Harter Act and COGSA. The Harter Act contained no monetary limitation; no statute, not even a domestic statute, was being "ousted" when the *contractual* monetary limit was set aside. Thus the peculiar concept of the "ouster" of a statute (and therewith of a treaty) played no part while the Harter Act governed. One might approve (*under the law of the United States only*) of the breaking, on certain happenings, of a limitation the carrier had devised and imposed in a contract of adhesion, without coming near to agreeing that a limit *imposed by statutory law, obedient to a treaty*, could be similarly "ousted". See Gilmore and Black, § 3-41, p. 180 (2d ed. 1975).

It is thus precisely symptomatic of the root trouble in this case that the court below relied heavily, even centrally, on its own 1931 decision in *Olivier Straw Goods Corporation v. Osaka Shoshen Kaisha*, 47 F.2d 878 (2d Cir. 1931), *cert. denied*, 283 U.S. 856 (1931), calling that case "remarkably similar to the present one", *Berisford Metals*, 779 F.2d at 845, Appendix at 10a. In truth, that case was markedly dissimilar to this, even on its own facts and equities; when the carrier's people, in *Olivier*, issued an on-board bill of lading, the ship had not even arrived in the named port of loading. This fact was plainly known to the carrier as a corporation, and to its people in the port who issued the false bill. *Olivier*, then, had to do with a fully knowing misrepresentation; our case involves nothing but an unfortunate error. The difference between the two cases is the difference between a lie and a mistake.

But the far more fundamental difference, with wide implications that mark this case as one this Court should consider, is that *Olivier* was decided (whether correctly or not) *in the time of the Harter Act*, five years before COGSA, implementing a treaty, took effect. No international uniformity problem was involved. *The very fact that the court below could, with no visible difficulty, cite Olivier as governing this case, both as to law and as to policy, 779 F.2d at 846, Appendix at 13a, shows that the international uniformity problem is not even being faced.* This lack marks this case not simply as one erroneously interpreting the Carriage of Goods by Sea Act, but as a decision based on the most fundamental error as to the proper *mode* of interpreting a multinational agreement fixing private commercial law. There cannot be a more suitable occasion for the grant of the writ prayed for herein.

This would be true even if there were no inter-circuit conflict. But there is sharp conflict with a Seventh Circuit holding, in *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt*, 1963 A.M.C. 665, 313 F.2d 872 (7th Cir. 1963), that even real "deviation" does not wipe out the COGSA § 1304(5) $500 limitation. This holding has been approved and followed in a district court in at least one other Circuit, *Krupp International Inc. v. Federal Atlantic Lake Lines*, 1982 A.M.C. 1799 (E.D. Mich. 1981) (not officially reported), and has even been followed by a Canadian court in search of United States law. *Drew Brown, Ltd. v. Orient Trader*, [1972] 1 Lloyd's L.R. 35 (Can. Ex.), *aff'd*, [1973] 2 Lloyd's L.R. 174 (Can.). The Second Circuit Court of Appeals has, of course, held otherwise, *Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *but cf. B.M.A. Industries. Ltd. v. Nigerian Star Line, Ltd.*, Nos. 85-7684, 7922, slip op. at 2259, 2264 (2d Cir. March 19, 1986), as has the Fifth Circuit, *Spartus Corp. v. S/S Yafo*, 590 F.2d 1310 (5th Cir. 1979). This conflict is on a matter of great concern both to ship and to cargo interests, especially in foreign trade, as to which even inter-circuit, and intra-circuit, uniformity is vital.

II. THERE ARE IN THIS CASE, AND IN OTHERS LIKE IT, NO EXTRAORDINARY EQUITIES THAT MIGHT OVERRIDE THE FOREGOING INTERNATIONAL CONSIDERATIONS.

Petitioner concedes that the rule of construction it has put forward, as proper for interpreting internationally negotiated texts of multinational application, might have to yield to a showing of actual gross fraud, or of other conduct so shocking as to create equities that would be determinative in the courts of all civilized countries.[8] But nothing of that sort is implicated in this case.

Reliance

The Court of Appeals bases its judgment on the equity of reliance. But "reliance" here cuts both ways. Petitioner agrees with the statement by the Court of Appeals, 779 F.2d 841, 845, Appendix at 9a-10a, that the negotiable bill of lading is a "fundamental and vital pillar of international trade and commerce . . .", that the bill ". . . has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading holds out", and that "the goods are locked up in the bill." But the bill of lading in this case quite surely "held out" that $500 per package was to be the measure of the carrier's liability. The goods were "locked up" in a bill that readably recited this limit as its most

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8 For instance, under Section 28 of the French "Law Concerning Contracts of Affreightment and Maritime Carriage", which implements the treaty here, see p. 3, n.1, *supra*, and is the French equivalent of the United States COGSA, the package limitation is available to the carrier where the shipper has not declared a higher value except in the case of carrier fraud or dol. Statute No. 66-420 of June 18, 1966. *See* Tetley, *Marine Cargo Claims*, 360, 603-610 (2d ed. 1978); Chauveau, *Traite de droit maritime*, § 813 (Paris 1958). Professor Erling Selvig of the Institute of Maritime Law, University of Oslo, explained that the Scandinavian countries will disregard the package limitation ". . . in cases of *intentional* misconduct *by the carrier himself*." Selvig, Unit Limitation of Carrier's Liability: The Hague Rules Art. IV(5), 5 Archiv for Sjørett 106, 137 (emphasis supplied).

important term—the most important, to both parties, by a factor of about 15 to one (see *supra*, pp. 2-3). The breaking of that limitation, in a few odd cases, can in no way contribute to "confidence" in the bill.

On the other side, there is the solid point that "confidence" is as important to carrier as it is to shipper. A quite recent Fifth Circuit case explains why:

> This position [that the concept of quasi-deviation should not be expanded to encompass unexplained non-delivery] also appears most reasonable as a matter of business practice. Section 4(5) of COGSA gives the shipper two options: to declare the full value of the cargo, obtaining full coverage from the carrier at the cost of higher rates, or to obtain lower rates by leaving the value undeclared and self-insuring for any value above $500. The shipper obviously has the best knowledge of the value of the cargo, and is in the best position to determine which of the two options would be most efficient from an economic standpoint. *In addition, the section 4(5) limitation serves an important function in allowing the carrier to evaluate his potential liability and make proper provision. See Insurance Co. of North America v. S/S AMERICAN ARGOSY*, 732 F.2d 299, 304 (2d Cir. 1984). We are reluctant to tamper with this function without some compelling reason.

C.A. Articulos Nacionales de Goma v. M/V ARAGUA, 756 F.2d 1156, 1161 (5th Cir. 1985) (emphasis supplied).

The holding in the present case even cuts athwart the Second Circuit's own words in S/S AMERICAN ARGOSY, uttered in 1984, and cited *supra* in the Fifth Circuit opinion:

> The district court's decision[9] would also threaten the role of the bill of lading as *an effective means for carriers*

9 That the vessel was liable *in rem* for cargo damage under an unauthorized bill of lading issued by a Non-Vessel Operating Common Carrier, under the theory that the vessel ratified the bill of lading by sailing with the cargo on board.

> *to limit their liability.* Under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5), the carrier's liability is limited to $500 per package "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." Moreover, the bill of lading constitutes prima facie evidence of a cargo's value, thereby preserving the carrier's ability to appraise its potential liability and to obtain insurance.

732 F.2d 299, 304 (2d Cir. 1984) (emphasis supplied).

It is simply mysterious that these considerations (so recently formulated by itself) did not move the same Court of Appeals in our case to protect *the very reliance interest* so clearly discerned.

It is the consignee, not the carrier, who is here seeking escape from the consequences of the shipper's actual choice—statutory limit and minimum freight. One might ask why this choice has not estopped the shipper, and his successor in interest, from claiming a higher value than the statutory value, the shipper's choice for which was clearly the inducement for the low freight.

Disproportionality

There is no equity, but rather gross disproportionality, in treating the SALVADOR's fault—erroneous issuance of a shipped bill of lading—in so drastic, even penal, a manner as is done in this case. The Second Circuit Court of Appeals has held that very gross negligence *as to furnishing an obviously unseaworthy ship* is no basis for breaching the $500 limit. *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhauser,* 507 F.2d 68 (2d Cir. 1974). Yet the effect of such negligence can be, and often is, the total or near-total loss of cargo—and the fault is at least as flagrant as in this case. Negligent nondelivery, misdelivery and short delivery are exactly similar in effect to the facts in this case. The goods are just not there. Yet the Second Circuit Court has turned away the attempt to break

the $500 limit in such cases. It seems that even an intentional misdelivery of goods, *Internat. Paper Co. v. Malaysia Oversea Lines*, 1976 A.M.C. 143, 144-145 (S.D.N.Y. 1975) (not officially reported) or damage from a fire wherein the owner is held liable, *The Edmund Fanning*, 291 F.2d 281 (2d Cir. 1953), would be limitable to $500. (And see *B.M.A. Industries*, slip op. decided March 1986, *infra* at pp. 15-16, refusing to break the $500 limit in a case of possibly criminal misdelivery.)

Why should the breach of duty in this case be more like "deviation" (or more suitable for the discernment of a "warranty" that is just another name for the same thing) than another breach that has the same or even a worse effect, and is equally a fault?

Certain language in the 1974 *Iligan* opinion must be pondered:

> We think the principle of "quasi-deviation" is not one to be extended. As previously noted even the holding that a deviation in the geographical sense voids limitations on the carrier's liability seems inconsistent with the language of COGSA.

Iligan, 507 F.2d at 72.

In 1974, the Second Circuit Court thus set its face against further extension of the "principle" of "quasi-deviation". But the present case is nothing but such an extension, with, at most, a change of name. The *Iligan* opinion, moreover, says that *even the voiding of the limitation by real deviation* (on which has been erected the whole superstructure of "quasi-deviation" and its equivalents) "*seems inconsistent with the language of COGSA*." Indeed it does.

Puzzlement deepens when one notes that on March 19, 1986, the Second Circuit held that misdelivery of an entire cargo, in violation of directions in the bill of lading, and even if procured by bribery, was compensable by the carrier only up to the COGSA $500 limit per package. *B.M.A. Industries, Ltd. v. Nigerian Star Line, Ltd.*, Nos. 85-7864, 7922, slip op. at 2259,

2264 (2d Cir. March 19, 1986). Said the court, "The principle of quasi-deviation is arguably inconsistent with COGSA, and is 'not one to be extended' " (citing *Iligan*, but not citing the present case).

From all this it becomes very clear that this subject—*not having been dealt with by this Court at all under COGSA*—badly needs this Court's attention.

III. THE OPINION BELOW WILL SERIOUSLY HARM THE UNITED STATES' ABILITY TO DEVELOP AN EFFICIENT MULTIMODAL TRANSPORTATION SYSTEM AND WILL PLACE CARRIERS CALLING AT UNITED STATES PORTS AT A COMPETITIVE DISADVANTAGE.

The anomaly created by the Second Circuit's disproportionate emphasis of the quantity of cargo received over the condition of cargo received, and over most other aspects of the bill of lading, will seriously harm the United States' ability to develop an efficient multimodal transportation system. It may very well deprive the United States of advantages other maritime nations are reaping from the ocean container.

The opinion below states that carriers will be deemed to have *guaranteed* receipt of the quantity, but not the condition, of cargo described in the bill of lading. The opinion indicates that the guaranty will apply even to cargo received by the carrier in locked and sealed ocean containers. This ruling will seriously hamper, if not totally prevent, the United States transportation industry from taking full advantage of the ocean container and a multimodal transportation system.

It will require all carriers to discharge, tally and reload all containers on receipt, or to install scales on every container pier in the world to weigh containers immediately before loading.

The ocean container, coupled with double stack railroad equipment, is just now starting to provide United States

railroads with the opportunity to carry substantial quantities of ocean cargo.[10] It is doubtful that United States railroads could take advantage of this opportunity if they were required to open and tally the contents of every container they received, or if they were required to weigh every container before loading it onto their rail equipment.

The ocean container also provides United States exporters of cargo with advantages that will be taken away by the Second Circuit's opinion in this case. The ocean container offers the physical possibility to the manufacturer of a product, far from any ocean, of loading the product into an ocean container, and securing it within the container according to the peculiarities of the product. The manufacturer can lock and seal the container to assure that his product will not be touched or tampered with until it reaches its final destination.[11]

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10 For discussions of double stack container trains' use of ocean containers and the effect of the ocean container and the double stack container train on multimodal transportation in the United States, see Field, *Landbridge Versus All-Water Struggle Debated at Seatrade Intermodal Panel*, Vol. 204, No. 13, Traffic World, 19 (Dec. 23, 1985); Down and Wise, *The Intermodal Challenge*, Vol. 205, No. 11, Traffic World, 30 (Mar. 17, 1986); DeBaer, *The Stack Car Revolution*, *id.* at 54; and Mahoney, *Intermodal Goal; Trim Time and Cost at Point of Interchange*, *id.* at 57.

11 A study by the International Chamber of Commerce, *The Development of International Container Transport: Its Application in Developing Countries*, 6-7 (Int'l Chamber Commerce 1977), has listed the following as advantages of the ocean container:

(a) *Faster transit time*, caused not by faster, more expensive ships, but by a reduction of in port time by smoothness in handling cargo on and off ships, which has reduced port congestion and delay.

(b) *Protection of cargo* because containers protect cargo against physical damage and permit shippers to use lighter and cheaper packaging. Containers also reduce the number of occasions during which the cargo is handled, thus reducing the chance of damage and pilferage.

The extra handling encouraged by the opinion below would, of course, destroy these advantages. *See also* Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 Stan. L. Rev. 1077 (1969).

According to the opinion below, ocean carriers will, at the very least, have to install container scales on all container piers throughout the world and/or will have to break the seal on each container, open the container, discharge its contents and tally its contents. Securing peculiar to the product might not be duplicated after the product is returned to the container, or the product might be damaged and/or pilfered during the process. Certainly, the cargo would be delayed. By overemphasizing the receipt aspect of the bill of lading, its contract aspect is seriously harmed.

The opinion will also hamper the present relay system, which promotes efficient transportation. This system allows cargo, remaining in a locked and sealed container, to be transferred from ship to ship at various relay points to provide a speedy and efficient method of transportation. *Parnass International Trade & Oil v. Sea-Land Service*, 595 F. Supp. 153 (S.D.N.Y. 1984). If cargo were transferred between carriers at the various relay points, the Second Circuit opinion in this case, together with the last "carrier doctrine"[12] expressed in *Madow v. Liberty Exporter*, 569 F.2d 1183 (2d Cir. 1978), would make each carrier in the chain a guarantor of the bill of lading quantity description and would force each carrier in the chain to discharge and tally each container's contents or to weigh each and every container before it was loaded or received by each and every carrier.

If carriers, realizing the impracticability of the opinion below, decide to continue business as is for the sake of the efficiency of the transportation system, and not to empty and tally or to weigh containers at the various transfer terminals, the carriers would, of course, assume greater risks. The carriers would undoubtedly pay higher insurance rates for the greater risks and would pass those rates on to cargo interests in

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12 The last carrier doctrine places upon the last carrier, in a chain of successive carriers, liability for damage or loss unless the last carrier can prove that it was not negligent or that it is protected by one of the COGSA exceptions from liability. *Madow*, 569 F.2d at 1185.

the form of higher freight rates, which would, in the final analysis, be paid by the consumer.

Even if each carrier did tally each and every container's contents on receipt, common sense tells us that the carrier's insurance rates would not decrease. The greater handling during emptying and loading containers would increase the risk of physical damage, and weighing containers would delay their transportation and advertise their contents to many people on the docks, thus inviting theft. The uncertainty left by this opinion would prevent both the vessels' and cargoes' underwriters from predicting whether the COGSA limitation would apply. Shippers of cargo would not be able to assure their underwriters that they would be fortunate enough to deal with carriers who mistakenly issue on-board bills of lading for cargo not loaded on board. The resultant uncertainty would probably raise, not lower, both cargoes' and vessels' insurance premiums.

The problems created by the Second Circuit opinion in this case surely run counter to the intent of the Interstate Commerce Commission cited by this Court: "It is our purpose and our hope to encourage the growth of this [multimodal] transportation phenomenon." *American Trucking v. A.T. & S.F.R. Co.*, 387 U.S. 397, 405 (1967). The problems also run counter to the "Congressional purpose to foster an efficient and fair national transportation system." *United States v. Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945).

The unfortunate and detrimental effects of this opinion must have been reached, not with the original purpose of the doctrine of unreasonable deviation or with all functions of a bill of lading in mind. It must have been reached by following a misguided tangent of reasoning to the tangent's logical conclusion. That tangent was based on two unsound foundations, application of a theory referred to as "quasi-deviation", "fundamental breach", or "warranty," in violation of the plain meaning of COGSA, and overemphasis of the quantity receipt aspect of the bill of lading in derogation of its contract aspect.

This overemphasis will hold carriers accountable, without the benefit of any defense, for quantities of cargoes, described in bills of lading to be within locked and sealed containers, although the practicalities of modern, multimodal shipping do not permit carriers to verify the quantity accurately. The tallying and weighing required by the opinion below will delay the delivery of cargo and will increase the risk of damage to the cargo, thus hampering the carrier's ability to perform the contract aspect of the bill of lading. Carriers will, however, be able to limit their liability if they are grossly negligent or if an employee criminally misdelivers as long as they have counted or weighed the cargo properly when each carrier receives the cargo.

The issue of a carrier's duty to verify the contents of containers was first broached in the bulk cargo case, *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628 (9th Cir. 1974) but the tangent did not start with that case. *Portland Fish* specifically refused to consider the effect of its ruling on containers. *Portland Fish* had estopped an ocean carrier from denying that it had received the weight of a bulk cargo of fish, which had been described in the bill of lading it issued. The *Portland Fish* court reasoned that, if a carrier had reasonable grounds to suspect that the bill of lading did not accurately describe the goods, marks, number, quantity, or weight, or if the carrier had no reasonable means of checking that information, the carrier was not bound to issue a bill of lading containing such a description, *Id.* at 633. Thus, if a carrier did harbor such suspicions, or had no reasonable means of checking the description, the carrier would be estopped from denying the bill of lading description vis-a-vis a person who had relied on them. *Id.*

This decision specifically avoided the use of dictum which could have been construed to apply the estoppel theory to containerized cargo. Ocean carriers feared that the estoppel theory might someday be extended from bulk cargo to containers and requested leave to file amicus curiae briefs for rehearing. The court found rehearing unnecessary:

> On rehearing, several ocean carriers have moved for leave to file briefs amicus curiae. However, it appears that the issues sought to be raised in such briefs concern the possible effect of our decision on the ocean transportation of containerized cargoes—those in sealed "packages" not normally opened and inspected by the carrier at the time he issues a bill of lading. The motions are denied. Since the case before us involves solely a bulk shipment subject to piece count, the questions thus raised will have to wait another day for decision. We intimate no opinion on them.

Id. 510 F.2d at 634 (9th Cir. 1974).

The courts did not take long to reach the container questions, and the tangent began by ignoring the "shipper's load and count" or "said to contain" clause on bills of lading. Once reached, the court in one decision, *Baby Togs Inc. v. S.S. AMERICAN WING*, 1975 A.M.C. 2012 (S.D.N.Y. 1975) (not officially reported), merely treated the bill of lading quantity description as *prima facie* proof. It did not estop the carrier from proving that it had not, in fact, received the quantity described in the bill of lading, and certainly did not hold the carrier to have *warranted* receipt of the quantity described by the bill of lading. The language emphasized below presumes that the carrier could rebut the bill of lading description:

> Defendant carrier contends that plaintiff has failed to prove the contents of the container and their condition at the time of delivery to defendant. In so doing, it relies upon the statements "Shipper's Load & Count" and "Said to Contain" appearing on the dock receipt and on the clean bills of lading which defendant issued. However, the bills of lading herein also list the number of cartons of infants' wear, their cubic measurement, and their weight, although under 46 U.S. Code, Sec. 1303(3)(c), the carrier may omit such information from the bill of lading if it has reasonable grounds for suspecting, or no reasonable means of checking, the accuracy of any marks, number,

> quantity or weight. *Spanish-American Skin Company v. Ferngulf*, 1956 A.M.C. 2238, 143 F. Supp. 345, 350 (S.D.N.Y. 1956), *aff'd*, 1957 A.M.C. 611, 242 F.2d 551 (2d Cir. 1957). Accordingly, the recitation of the number, weight and measurement in the bills of lading established *prima facie* receipt by the carrier of the number, weight and measurement recited, regardless of the above quoted statements appearing on those documents.
>
> *This prima facie proof has not been effectively rebutted by competent evidence.*

Id. 1975 A.M.C. at 2018 (emphasis supplied).

Application of even the estoppel theory to the case now before the bar should decide this case correctly. It would hold defendants liable as if the cargo had been loaded on board and would, of course, award plaintiff what plaintiff paid for, a bill of lading which limited the carrier's liability to $500 per package.

In fact, the *Baby Togs* court stated *in dictum* that the package limitation, if relevant, would have been applied. *Id.* at 2022.

The Second Circuit's imposition of insurer liability on S/S SALVADOR seems out of step with even this line of reasoning when it is compared with the more recent Second Circuit opinion in *B.M.A. Industries, Ltd. v. Nigerian Star Line, Ltd.*, Docket Nos. 85-7864, 7922, slip op. 2259 (2d Cir. March 19, 1986), which was discussed, *supra*, at pp. 15-16. It held that even *criminal* misdelivery would not constitute an unreasonable deviation.

The *B.M.A. Industries* rationale is more in line with the clear meaning of COGSA, and with the interpretation of the law governing United States inland transportation. For the sake of predictability and nationwide uniformity, courts permit inland carriers to limit their liability even if they fundamentally breach their contracts of carriage. *Rocky Ford Moving Vans,*

Inc. v. United States, 501 F.2d 1369 (8th Cir. 1974), expressed the rationale as follows:

> . . . [W]e rely primarily upon the policy underlying the Carmack Amendment to the Act to Regulate Commerce, 49 U.S.C. § 20(11).
>
> * * * * *
>
> The Carmack Amendment thus expressly recognizes the right of a shipper and carrier to establish an agreed value of the goods to be shipped which limits the carrier's liability and permits a shipper thereby to benefit from a lower rate. *Strickland Transportation Co. v. United States*, 334 F.2d 172 (5th Cir. 1964). *In adopting the Carmack Amendment, Congress intended to impose a single uniform federal rule upon the obligations of carriers operating in interstate commerce. New York, New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953); *Atchison, Topeka & Sante Fe Ry. v. Harold*, 241 U.S. 371, 36 S.Ct. 665, 60 L.Ed. 1050 (1916); *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1913). *Such statutory provisions supercede [sic] "the diverse requirements of state legislation and decisions", Southern Ry. v. Prescott*, 240 U.S. 632, 639-640, 36 S.Ct. 469, 472, 60 L.Ed. 836 (1916), and render invalid all "agreement[s] in derogation of them * * *." *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411, 420, n.9, 79 S.Ct. 1210, 3 L.Ed.2d 1334 (1959).

Rocky Ford, 501 F.2d at 1371, 1372, (emphasis supplied).

The Western District of Oklahoma restated and followed this rationale in *Conoco, Inc. v. Andrews Van Lines, Inc.*, 526 F. Supp. 720 (W.D. Okl. 1981). It too emphasized the importance of the ". . . overriding federal policy of uniformity." *Id.* at 722.

It is curious, to say the least, that the Eighth Circuit and the Western District of Oklahoma so clearly recognize the need for

uniform application of federal transportation law throughout the United States, but the Second Circuit does not recognize the need for the uniform application of a multinational convention throughout the maritime world.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 91, 195—August 1985 Term

Argued: September 30, 1985

Decided: December 16, 1985

Docket Nos. 85-7401, 85-7429

BERISFORD METALS CORPORATION,

Plaintiff-Appellant-Cross-Appellee,

—against—

S/S SALVADOR, her engines, boilers, etc., and A/S IVARANS REDERI,

Defendants-Appellees, Cross-Appellants.

Before:

FRIENDLY, MANSFIELD and WINTER,

Circuit Judges.

Appeal by plaintiff from an order of the Southern District of New York, Gerard L. Goettel, *Judge*, limiting the liability of the defendant carrier and its ship for loss of cargo to $500 per package under § 4(5) of the Carriage of Goods By Sea Act, 46 U.S.C. § 1304(5). Defendant carrier and its ship cross-appeal from the denial of their request that the action be dismissed.

The order is reversed and the case is remanded with directions to enter judgment for the full amount of plaintiff's loss.

JOHN P. CONROY, Esq., New York, NY (Douglas A. Franklin, Esq., McHugh & O'Conor, New York, NY, of counsel), *for Berisford Metals Corporation.*

CHESTER D. HOOPER, Esq., New York, NY (Ara A. Shimshidian, Esq., Haight, Gardner, Poor & Havens, New York, NY, of counsel), *for S/S Salvador and A/S Ivarans Rederi.*

MANSFIELD, *Circuit Judge*:

Berisford Metals Corporation (Berisford), plaintiff in this cargo-loss action, appeals from an order and judgment of the Southern District of New York, Gerard L. Goettel, Judge, granting its motion for summary judgment against the ship S/S Salvador and A/S Ivarans

Rederi (Ivarans), its owner and operator, for loss of 70 bundles of tin ingots valued at $483,214.90 but applying the limitation of liability provisions of § 4(5) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5)[1] (COGSA), to limit the defendants' liability to $500 per bundle, or a total of $35,000. Defendants cross-appeal from the district court's denial of their motion for dismissal of the action. We reverse the judgment to the extent that it limits defendants' liability to $500 per bundle and remand the case with directions to enter judgment in Berisford's favor for the full value of the lost cargo. We affirm the district court's denial of defendants' motion to dismiss the complaint.

The material facts are not in dispute. On June 23, 1983, Berisford contracted to purchase from Paranapanema International Ltd. (Paranapanema), located in Sao Paolo, Brazil, 50 metric tons of grade A tin ingots in bundles at a price of $13,140 per metric ton (a price later changed by the parties to $13,300 per metric ton). The terms were F.O.B. vessel at Santos, Brazil, for shipment to New York in January 1984.[2] Payment was to be made

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1 Section 4(5) of COGSA, 46 U.S.C. § 1304(5) provides:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

2 F.O.B. or Free on Board "means that title to property passes from the seller to buyer at the designated FOB point." 10 *Williston on Contracts*, § 1079A, at 94 n.6 (3d ed. 1967). Since the vessel was designated as the FOB point in this case title to the goods was to pass when the goods were loaded on board the ship. *See id.*, § 1080A, at 109-10 (Standard American Foreign Trade Definitions).

net cash 45 days after ocean bill of lading date against presentation of a "full set of shipping documents," which, in conjunction with the F.O.B. vessel term, was understood by the parties as requiring a clean on board bill of lading.

Pursuant to the contract Paranapanema delivered 100 bundles, each containing 30 tin ingots and steel-strapped onto wooden pallets, to Ivarans' agent at Santos, Agencia de Vapores Grieg, S.A. (Grieg), which maintains a terminal located about 5 kilometers from the dock where cargo would be loaded onto Ivarans' ship. Grieg acknowledged receipt of the bundles on December 29, 1983. Grieg stuffed the 100 bundles into four 20-foot containers at its terminal, as follows:

Container No. NICU 901692 35 bundles
Container No. NICU 703002 35 bundles
Container No. IVLU 904540 9 bundles
Container No. IVLU 902420 21 bundles

The containerization was carried out "at ship's convenience", to which Berisford did not object. Clause 6 of the bill of lading later issued by Ivarans authorized the carrier to stow goods "as received or, at Carrier's option, by means of containers or similar articles of transport used to consolidate goods".

After stuffing of each container its doors were closed, locked and sealed. On January 3, 1984, the containers were transported by Grieg to a Brazilian government-controlled storage yard located near the loading dock. Upon delivery of the containers to that yard they appeared, from the sound and handling of the trucks used to transport them, to be loaded, not empty. The government storage yard issued receipts indicating weights approxi-

mately equaling those listed on the shipping documents. At that point the seals and locks appeared unchanged.

On January 4, 1984, the containers were removed from the yard and loaded by stevedores aboard the vessel. On the same date Grieg, acting on behalf of Ivarans and the Master of the S/S Salvador, issued a clean on board bill of lading stating that the ship had received "100 bundles steel strapped on wooden skids containing 3000 refined tin ingots, "Mamore" brand, with a minimum purity of 99.9%". The gross weight was stated on the bill to be "50,647" kilos and the net weight as "49,845" kilos. Par. 3 of the conditions on the back side of the bill of lading provided that the provisions of COGSA would apply throughout "the entire time the goods [would be] in the carrier's custody, including the period of carrier's custody before loading on and after discharge from the ship". The bill further stated that unless a higher value had been declared in writing prior to delivery and inserted in the bill, the $500 limit per package specified by COGSA would govern the carrier's liability. *See* note 1, *supra*.

Upon the loading of the four containers aboard the ship, neither Ivarans nor its agent Grieg verified the contents or made a tally of the 100 bundles represented by the bill of lading to be in the containers. After being loaded aboard the ship, the containers were not shifted from their place of stowage until the ship arrived in New York on January 19, 1984, at the Red Hook Terminal in Brooklyn. There the four containers were discharged on January 20, 1984, and placed on the ground outside Pier 11 to await stripping. On January 24, 1984, Universal Maritime Services, Ivarans' stevedore, opened the four containers by using a bolt cutter or pliers to cut the seals and found that two of them supposed to contain 70

bundles were empty. Before being broken the seals of the containers appeared to be intact, with no evidence of tampering; in fact, the seals were pitted and rusted. Neither the floors of the two containers nor the snow-covered ground around them near Pier 11 revealed any evidence of recent removal of any cargo from the containers. Each bundle would have weighed approximately 1100 lbs.

On January 27, 1984, Berisford wrote U.S. Navigation, Ivarans' New York agent, charging Ivarans with responsibility for the loss of the 70 bundles. On February 7th Mr. K. W. Hansen, a marine surveyor retained by U.S. Navigation to investigate the loss, rendered a written report which stated that in his opinion the "70 missing bundles of tin ingots were never loaded in the two containers."

In the meantime the Mellon Bank in New York, representing Paranapanema, the seller and shipper of the tin ingots, presented to Berisford in accordance with the purchase contract a full set of shipping documents with respect to the 100 bundles of tin ingots purchased by Berisford, including three original on board bills of lading issued by the carrier (Ivarans), Paranapanema's invoice, weight and analysis certificates, and a draft in the amount of $662,938.50, payable 45 days after the bill of lading date. Since the papers were in order and complied with the parties' purchase contract Berisford accepted the draft and on February 17, 1984, paid the full amount of the purchase price to the Mellon Bank as collection agent for Paranapanema. In addition, Berisford paid Ivarans' freight charges amounting to $10,101.67.

On August 31, 1984, Berisford commenced the present action, seeking $525,000 damages for the missing cargo.

Defendants' answer admitted receipt of the shipment of bundles of tin ingots but denied liability, asserting its rights under COGSA and its bill of lading with respect to the shipment, including COGSA's $500 per package limitation on its liability, and alleging that it acted without any fault or neglect. On February 5, 1985, after the parties had conducted pre-trial discovery, including the taking of depositions,[3] Berisford moved for summary judgment, contending that it had paid the purchase price in reliance on Ivarans' representation in its on board bill of lading that the 70 missing bundles had been loaded aboard its ship, that it was committed by its purchase contract to pay the purchase price upon the seller's presentation of the shipping documents, and that the defendant carrier's issuance of a clean on board bill of lading when in fact it had not received the 70 bundles constituted a "quasi-deviation," depriving the carrier of the benefits of the bill of lading, including its per package limitation on liability. Berisford sought damages in the amount of $483,214.90 plus interest.

Ivarans did not seriously question the probability that the loss of the 70 bundles occurred prior to its loading of the containers aboard its ship in Santos. Indeed, the evidence that the two containers had not been opened after loading and prior to their being found empty upon their arrival in New York (while still in Ivarans' custody) was overwhelming. Ivarans offered no evidence to the contrary. Its principal defenses were (1) that it could not be faulted for any pilferage that may have occurred while the goods were in the custody of the Brazilian govern-

[3] The persons deposed included Paul W. Schaldonat, Berisford's Vice President; Ingeman Johansen, captain of the S/S Salvador; and Peter J. Rainone, employee of McRoberts Protective Agency, who was in charge of security at Pier 11, Red Hook Terminal, Brooklyn.

ment-controlled dockside warehouse in Santos since it had no control over that warehouse or the government's longshoremen, (2) that Berisford's loss was not caused by its misdescription of the contents of the containers because Ivarans was not required, under the purchase contract's provision for payment against a "full set of shipping documents," to issue an on board bill of lading, and (3) that in any event defendants' liability was limited to $500 per bundle. In opposing plaintiff's motion the defendants, in an affidavit of their attorney, Chester D. Hooper, asked that the complaint be dismissed or in the alternative that Ivarans' liability be limited to $500 per bundle.

In an oral bench opinion Judge Goettel concluded that an evidentiary hearing was unnecessary since the existing evidence demonstrated that the loss had occurred while the cargo was in the possession of the Brazilian government's stevedores in Santos. He rejected Ivarans' argument that it was not responsible for a loss occurring while the cargo was in the possession of the Brazilian Government. However, he also rejected Berisford's contention that Ivarans' issuance of a false on board bill of lading constituted a "quasi deviation" negating the availability of the COGSA per package limitation on liability. Instead, he held that a carrier is estopped from denying that the goods were loaded only upon a showing that it knew that they had not been loaded. He accordingly granted plaintiff's motion to the extent of awarding it judgment in the sum of $35,000, from which both parties appeal.

DISCUSSION

The central question raised by this appeal is whether a carrier that issues a clean on board bill of lading erroneously stating that certain goods have been received on board when they have not been so loaded should be precluded from limiting its liability pursuant to an agreement binding the parties to the terms of § 4(5) of COGSA, 46 U.S.C. § 1304(5). For the purpose of resolving this issue a brief review of pertinent admiralty law principles is helpful.

As we recently reaffirmed in *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro*, ____ F.2d ___, Oct. 15, 1985, Dkt. No. 85-7103, Slip Op. 6429, 6437-38, a negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another. It constitutes an acknowledgement by a carrier that it has received the described goods for shipment. It is also a contract of carriage. As a document of title it controls the possession of the goods themselves. *See Gilmore and Black, The Law of Admiralty*, Ch. III, § 3-1, p. 93 (2d ed. 1975). It has been said that the bill and the goods become one and the same, with the goods being "locked up in the bill." *Id.* 96. As the court stated in *Pollard v. Reardon*, 65 F. 848, 852 (1st Cir. 1895),

> "In the developments of commerce and commercial credits the bill of lading has come to represent the property, but with greater facility of negotiation, transfer, and delivery than the property itself. . . . And it has become so universal and necessary a

> factor in mercantile credits that the law should make good what the bill of lading thus holds out. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon."

The necessity for maintaining the integrity of and confidence in bills of lading has been recognized by us in a line of cases beginning before and continuing after the 1936 enactment of COGSA. In *Higgins v. Anglo-Algerian Steamship Co.*, 248 F. 386 (2d Cir. 1918), for instance, after reviewing decisions of English courts on the question we held that a carrier which issued a clean bill of lading falsely representing that it received goods in apparent good order and condition when it knew they were damaged may not take advantage of exceptions and limitations in the bill for its own benefit.

The carrier's responsibility for issuance of false bills of lading was thoroughly considered by this court in *Olivier Straw Goods Corporation v. Osaka Shosen Kaisha*, which was the subject of two appeals over a period of four years, 27 F.2d 129 (2d Cir. 1928) (*Olivier I*), *aff'd after remand*, 47 F.2d 878 (2d Cir.), (*Olivier II*), *cert. denied*, 283 U.S. 856 (1931). In that case, which was remarkably similar to the present one, the shipper delivered 18 cases of hemp to the carrier at its Yokohama dock for shipment by steamer to New York. The carrier issued and delivered to the shipper a bill of lading representing that the cases had been loaded on the ship Alaska Maru when in fact they had not been loaded because that ship had been diverted elsewhere due to an earthquake. The cases of

hemp, which had been placed by the carrier in an unprotected dockside shed, were lost as a result of looting. Relying on the bill of lading and other shipping papers forwarded to it by the shipper, the purchaser's bank accepted and paid the shipper's invoice. The purchaser then sued the carrier for the value of the hemp. In an opinion by Judge Augustus Hand, concurred in by Judges Learned Hand and Swan, the court held the carrier liable for the full value of the goods described in the bill of lading, stating:

> "The bill of lading recited that the goods were shipped in apparent good order and condition. That statement was a warranty that they were so shipped, and the libelant, as indorsee of the bill of lading, acquired the direct obligation of the carrier and with it the right to sue. . . .
>
> "The warranty that the goods were on board was broken by the failure to ship them, and that breach . . . deprived the carrier of the right to invoke the clauses limiting liability. In The Sarnia, 278 F. 459, where the cargo had been improperly stowed on deck, we held that the valuation clauses in the bill of lading did not serve to limit damages. We said, at page 461 of 278 F.: 'The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favor.'
>
> * * * * *
>
> "Certainly a breach like the one here, which arose from a failure to ship the cargo at all, with its

> consequent loss or destruction on land, was no less fundamental than a deviation in the voyage, or than stowage of cargo on deck contrary to agreement, or than misdelivery of goods. In all such circumstances valuation clauses in the bill of lading have been held inoperative to relieve the shipowner. St. Johns N.F. Shipping Corporation v. S.A. Companhia Geral, etc., 263 U.S. 119, 44 S. Ct. 30, 68 L. Ed. 201; The Cabo Villano (C.C.A.) 18 F.(2d) 220; Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto (C.C.A.) 282 F.235; The Sarnia (C.C.A.) 278 F. 459." *Olivier II*, *supra*, at 879-80.

Although we have declined to extend full liability in some contexts that have been likened to deviations or "quasi-deviations" in a voyage, *see Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68, 71-72 (2d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 19 (2d Cir. 1969) (Hays, J., dissenting), *cert. denied*, 397 U.S. 964 (1970), we have steadfastly adhered to the result reached in *Olivier II* and have cited the case with approval for the proposition that the $500 per package limitation of liability may not be invoked by a carrier that has issued an on board bill of lading erroneously representing that goods were loaded aboard its ship, regardless whether or not the carrier acted fraudulently. *Elgie & Co. v. S.S. "S.A. Nederburg"*, 599 F.2d 1177, 1181 (2d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980). It is true that *Elgie & Co.* involved a shipment from the United States governed by the Pomerene Act, 49 U.S.C. § 81 *et seq.*, which does not contain limitation of liability provisions. However, the court took pains to point out that it did not base its holding on that distinc-

tion but on what it conceived to be "established doctrines of admiralty law", citing *Olivier II*. Similarly we recognized that it was "the common law rule" that such a fundamental misstatement in a bill of lading need not be fraudulent or intentional for liability to ensue. 599 F.2d at 1180.

The *Olivier II* ruling represents just as sound public policy today as it did in 1931. Whether one likens the carrier's issuance of a false bill of lading with respect to its loading of cargo to a "deviation," a "breach of warranty" or a representation which it must be "estopped" to deny, its adverse impact on trade and on reliance on bills as an essential method of facilitating trade is serious. Title to the goods usually passes from the seller to the buyer when the seller delivers the goods to the carrier and the carrier or its agent issues a bill. In the past, on board bills, signifying that the goods had been loaded on board the ship, were generally required. More recently, "received for shipment" bills, which indicate merely that the carrier has received the goods, are sometimes used. *See* 10 *Williston*, *supra*, at § 1078A, pp. 83-87. In this case, an on board bill was clearly required by the parties. When the proper bill issues, the seller then ceases to assume any risk of loss or damage. The carrier, by issuing the bill, enables the seller to collect full payment of the purchase price from the buyer since presentation of the bill to the buyer assures it that the seller has fulfilled its commitment to ship the goods and obligates the buyer to pay for them. Presentation of an on board bill also serves to satisfy the buyer that the goods have not been stolen or lost while in the custody of the carrier prior to loading, an interval during which the seller bears the risk of any loss in any transaction requiring such a

bill. If, instead, the buyer were free to question the accuracy of the bill upon presentation, the entire structure would be weakened as a method of carrying out commercial transactions.

In support of their contention that a carrier may be held liable for a misstatement in its bill of lading only if it acted intentionally or fraudulently, defendants direct our attention to decisions holding that when a carrier issues a bill of lading to the effect that it has received goods in apparent good condition it may not be held liable beyond a per package limitation for damaged goods contained in the bill of lading or COGSA unless it had actual knowledge of the damaged condition at the time of loading or the damage was readily apparent at that time. *See The Carso*, 53 F.2d 374 (2d Cir. 1931); *American Industries Corp. v. M.V. Margarite*, 556 F. Supp. 206, 212-13 (S.D.N.Y. 1981). These "conditions" cases are readily distinguishable from those applying *Olivier II*. The "conditions" cases raise the issue of the extent to which a carrier must inspect the condition of goods made, sold and bought by others. Since the imposition of a duty to make a detailed inspection of the condition of the contents of every package received from others would be excessive, the carrier may be held liable only if it knew or could readily see that the packages were not in good condition. A carrier is not required to open every package received from a shipper and inspect the contents before issuing a bill to the effect that they appear to be in good condition.

When a carrier, on the other hand, makes a representation in a bill of lading with respect to *its own conduct* it is properly held to a higher standard since it is reasonably expected to be aware of *its own actions*, including

whether or not it has loaded cargo, *Olivier II*, *supra*; *Miles Metal Corp. v. M.S. Havjo*, 494 F.2d 563 (2d Cir. 1974), or has loaded the cargo below or above decks. *See St. Johns N.F. Shipping Corporation v. S.A. Companhia Geral*, 263 U.S. 119 (1923); *Encyclopaedia Britannica v. S.S. Hong Kong Producer*, *supra*, at 18; *The Sarnia*, 278 F. 459, 463 (2d Cir. 1921), *cert. denied*, 258 U.S. 625 (1922); *Jones v. The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953). As we stated in *Nichimen Company v. M.V. Farland*, 462 F.2d 319, 330 (2d Cir. 1972), "the duty to load, stow, and discharge cargo—and the consequences for failing to do so properly—fall upon the ship and her owners." 46 U.S.C. § 1303(2) specifically provides, "The carrier shall properly and carefully *load*, handle, stow, carry, keep, care for, and discharge the goods carried." (Emphasis supplied).

Applying the foregoing principles to the present case, we conclude that the defendants must be held responsible for the full value of the lost cargo at the time of shipment in Santos and cannot invoke the $500 per package limitation of liability provision of § 4(5) of COGSA, 46 U.S.C. § 1304(5). The carrier here, having received 100 bundles of tin ingots from the shipper in Santos, issued a false F.O.B. bill of lading with respect to its own conduct, warranting that on January 4, 1984, it had loaded 100 bundles on its ship when in fact it had loaded only 30. The bill of lading, whether or not intentionally false, enabled the shipper to collect from Berisford, the buyer, the full purchase price for 100 bundles. If the carrier had disclosed that 70 bundles had not been loaded, Berisford would have been entitled to refuse payment and the loss would have fallen on the seller of the goods as required by the conditions of the sales contract. The carrier's

misrepresentation therefore amounted to a fundamental breach going to the very essence of its contract and precluding it from invoking those provisions extending the limitation of liability terms of § 4(5) of COGSA to the period when the goods were on shore.

Defendants cannot escape responsibility on the ground that the four containers into which it claims that it had placed the bundles after receipt from the shipper were locked and sealed at the time when the containers were loaded aboard its ship, the S.S. Salvador. It is undisputed that the defendant received from the shipper the 100 separate bundles and that for its own convenience it placed them in the four containers. It was thereafter responsible for verifying the contents before loading the containers and issuing a clean on board bill of lading. The weight of the missing 70 bundles of tin ingots was approximately 78,885 lbs. Even if opening of the containers posed difficulties, at the very least the carrier owed a duty to verify the weight of the containers at shipside before they were placed aboard its ship and before it stated that they contained 100 bundles of tin ingots weighing the equivalent of 50,647 kilos or 111,656 lbs., which would have been 78,885 lbs. in excess of the weight of the containers actually loaded.

Defendants argue that, even if they might have been liable for breach of warranty under pre-COGSA principles outlined in *Olivier II*, Congress in effect intended the limitation of liability provisions of COGSA to override those principles in a case governed by it. *See* dissenting opinion of Judge Hays in *Encyclopaedia Britannica v. S.S. Hong Kong Producer, supra*, 422 F.2d at 19-20. We disagree, however, since courts in this circuit have long refused to hold that COGSA altered pre-COGSA law

with respect to deviation and other conduct carrying the same consequences. *See Elgie & Co. v. S.S. "S.A. Nederburg," supra*, 599 F.2d at 1181 (false representation in bill of lading that cargo was loaded on ship renders $500 per package limitation inapplicable);[4] *Encyclopaedia Britannica v. S.S. Hong Kong Producer, supra*, at 18 (unauthorized on deck stowage of goods renders $500 per package limitation inapplicable); *Jones v. The Flying Clipper, supra* (same).

Lastly, Ivarans contends that since the theft of the ingots occurred while the property was in the temporary custody of the Brazilian government it is exempted from liability by § 4(2)(q) of COGSA, 46 U.S.C. § 1304(2)(q), which was incorporated in the parties' contract. Section 4(2)(q) exempts the carrier from liability for damage or loss "arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception. . . ." The argument misconceives the nature of Berisford's claim. Its suit is not based on the theft of the ingots or on Ivarans' negligence but on the carrier's false representation that it loaded the 70 containers on its ship. Regardless whether some third party stole the ingots, the carrier here was obligated to state truthfully what it had loaded. If the carrier had truthfully stated what it had loaded on the ship, Berisford would not have been required to pay the purchase price for the 70 bundles of unloaded ingots

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4 In *Elgie & Co.* the bill of lading, notwithstanding the absence of liability limitations in the Pomerene Act, did extend by contract the application of COGSA to the entire period of time when the goods were in the carrier's custody. See 1976 A.M.C. 2446, 2449 & n.4 (not officially reported). Nevertheless, this was not advanced as a basis for departing from the fundamental rule of *Olivier II*.

which it had contracted to purchase. As between the purchaser, which could not have verified the accuracy of the carrier's representation as to the number of bundles loaded, and the carrier, the carrier is the party that must be held responsible for loss resulting from the falsity of its warranty that the goods had been loaded when in fact it had not put them aboard its ship.

Our holding leaves intact the principle that, once goods are aboard the ship as represented, a carrier may be responsible for misdescription of the apparent condition of the goods loaded by it only upon proof of knowledge or intent. *The Carso*, *supra*. We hold simply that when a carrier misrepresents its own conduct in loading goods aboard ship it is responsible for the misrepresentation and may not invoke contract provisions incorporating COGSA's limitations on liability.

The order and judgment of the district court are reversed and the case is remanded to the district court with directions to enter judgment in favor of Berisford in the sum of its full damages, plus that portion of freight and handling charges attributable to the lost bundles, and costs and interest from January 20, 1984.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

84 Civ. 6311

BERISFORD METALS CORPORATION,

Plaintiff,

—v.—

S/S SALVADOR and A/S IVARANS REDERI,

Defendants.

New York, New York—April 19, 1985—10:00 a.m.

Before:

HON. GERARD L. GOETTEL,

District Judge.

APPEARANCES:

McHUGH & O'CONNOR
John P. Conroy and Douglas A. Franklin
Attorneys for Plaintiff

HAIGHT, GARDNER, POOR & HAVENS
Chester D. Hooper and Elizabeth T. McCandless
Attorneys for Defendants

THE COURT: The following is the decision of the Court:

This is an admiralty action involving a cargo loss. The facts are straightforward and generally not in dispute.

The plaintiff commenced this action to recover damages for the nondelivery of 70 bundles of tin ingots intended to be shipped on board the S/S Salvador from Santos, Brazil to New York pursuant to defendant Ivarans Rederi Lines' bill of lading No. 202. Plaintiff purchased 100 bundles of tin ingots containing a total of 3000 ingots from Paranapanema.

Paranapanema delivered the 100 bundles to Grieg, an agent of Ivarans at a terminal where they were stuffed into four containers. Pursuant to clause 6 in the bill of lading, Ivarans was permitted to containerize the bundles for shipment.

After the containers were sealed they were delivered to a government controlled storage yard. The four containers remained in the yard for less than 24 hours. This area is part of the dock area where the S/S Salvador was loaded.

On January 4, 1984, the four containers were removed from the government storage yard and loaded on board the vessel by government stevedores.

Ivarans issued a bill of lading stamped "On Board," at the time the four containers were loaded on the S/S Salvador.

The vessel departed and made several stops before arriving in New York. When the vessel arrived in New York, the four containers were offloaded with seals and locks intact.

Upon opening, two of the containers, each supposedly containing 35 bundles, were found to be empty. The other two containers had their proper cargo in them.

The plaintiff now moves for summary judgment, arguing that the 70 bundles of tin were never loaded aboard the vessel at Santos.

The defendants acknowledge that the 70 bundles were not delivered but deny knowing where they disappeared.

There are obviously only three general locations in which the bundles could have disappeared: either before loading, during the voyage at one of the stops, or after arrival in New York.

In theory, one might conclude that an evidentiary hearing is necessary to determine where the loss occurred. But an evidentiary hearing would not accomplish a thing.

The two parties have presented all the evidence they have on the issue. Based on the evidence before us, it does not appear that the bundles were taken from the containers after arrival in New York. It would have been quite difficult to have pilfered the number of tin ingots missing during a stop on the way to New York, and so it can be argued that it appears most likely that it occurred during the 24 hours that the tin ingots were in the possession of the government's stevedores in Brazil.

There is, of course, some evidence to the contrary, namely that when the containers were moved and when they were loaded, there was no indication that they were empty, and since these bundles of tin ingots are extremely heavy, their absence should have been noted. However, it is a reasonable conclusion from all of the facts presented that it probably occurred before loading.

Two other factual issues are supposedly disputed. In this Court's view they are not truly factual issues at all but conclusions of law which have no bearing upon the ultimate determination of this case.

There is no indication that the holding of any evidentiary hearing would clarify the issues to be faced and there appears to be no reason to hide behind the possibility that a trial could lessen the difficulty of deciding the legal issues now presented.

The bill of lading contains an express provision extending the application of The Carriage of Goods by Sea Act, 46 U.S.C. § 1300 et seq. (hereinafter "COGSA") throughout the entire time the goods were in the carrier's custody, including the period of time before loading and after discharge from the ship.

COGSA contains the usual provisions for a package limitation unless a higher value has been declared in writing prior to delivery and inserted in the bill of lading, in which case the carrier obtains an additional payment. 46 U.S.C. § 1304(5).

It has been this Court's observation that this is very rarely done. It is apparently far cheaper to simply obtain insurance for the shipment which would be necessary in any event and

not to declare the excess value. In this instance, the plaintiff is actually the insurer of the shipment seeking subrogation.

Initially, the defendants argue that they have no liability whatever for this loss since the containers were in the possession of Brazilian Government stevedores for a period of 24 hours, and if, as the plaintiff argues, that is the time at which the loss occurred, defendants should not be held responsible.

The Court cannot accept this concept. While there are cases which find that a carrier is not liable when goods disappear after unloading into the possession of government stevedores, this is not that kind of case.

The goods were given to the defendant Ivaran, delivered to it and stored by it. Putting the goods into a container had some value to both parties, but it did mean that for the period prior to the loading, the goods were out of its possession and Ivaran didn't open the container to check and see whether the goods were still in the container when it issued its on board bill of lading. Under these circumstances, the carrier must take responsibility for the loading procedure.

The carrier asserts that, assuming it is liable, it is liable only to the extent of the package limitation which in this instance would be $35,000, which is only a small part of the total loss.

The plaintiff argues that the package limitation cannot be asserted here because there was a "quasi deviation" which deprives the carrier of the benefits of the bill of lading, including the package limitation.

The plaintiff acknowledges that COGSA was in effect during the period when the loss probably occurred. It argues, however, that the issuance of an on board bill of lading when, in fact, the goods have not been loaded, constitutes a quasi deviation.

It appears clear that if there was any proof that the carrier knew that the goods had not been loaded and, nevertheless, issued an on board bill, they would be estopped to deny the loading and they would have lost their protection under COGSA.

That, however, is not the case before this Court. Even accepting the plaintiff's argument that in all likelihood the loss occurred before loading, there is no proof whatever that the carrier was aware of that fact when it issued the on board bill.

The plaintiff relies on *Elgie Co. v. S. S. S. A. Nederburg*, 559 F.2d 1177 (2d Cir. 1979) with which I am intimately familiar.

In *Nederburg*, the Second Circuit, sua sponte, developed the approach that on outbound shipments, the Pomerene Act controlled and since in that instance the bill of lading did not make COGSA effective at the time of delivery at the pier, the COGSA package limitation did not apply when the goods were, in fact, not loaded.

The Pomerene Act has no extra-territorial effect and does not apply, since these goods were loaded in Brazil and the bill of lading was issued in Brazil.

The plaintiff argues that some of the reasoning in the *Nederburg* case, if applied here, could be used to find that the absence of the cargo, for which a bill of lading was issued, constituted a quasi deviation negating the availability of the COGSA package limitation, 46 U.S.C. § 1304(5).

It is an interesting argument. However, there have been literally thousands of similar cases since the time that *Olivier Straw Goods Corporation v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir. 1928) and 47 F.2d 878 (2d Cir. 1931), was first decided and even since the *Nederburg* case was decided, and this approach has never been accepted by any court, to my knowledge. If it is going to be accepted by any court, it is going to have to be a higher court accustomed to making the law in the admiralty field and not by a district court.

Consequently, the Court finds that the plaintiff is entitled to recover but its recovery is limited to the package limitation, and judgment should be entered in its favor in the amount of $35,000.

Judgment may be entered with costs for the plaintiff.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of January one thousand nine hundred and eighty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. RALPH K. WINTER,
Circuit Judges.

Docket Nos. 85-7401, 85-7429

BERISFORD METALS CORPORATION,

Plaintiff-Appellant
Cross-Appellee,

—v.—

S/S SALVADOR, her engines, boilers, etc.
and A/S IVARANS REDERI,

Defendant-Appellees
Cross-Appellants.

A petition for rehearing having been filed herein by Appellee-S/S SALVADOR and A/S IVARANS REDERI

Upon consideration thereof, it is

Order that said petition be and it hereby is DENIED.

/s/ ELAINE B. GOLDSMITH

Clerk

INTERNATIONAL CONVENTION

FOR THE UNIFICATION OF CERTAIN RULES RELATING TO (OCEAN) BILLS OF LADING SIGNED AT BRUSSELS, THE 25TH AUGUST, 1924

U.S. Treaty Series No. 931
U.S. Statutes at Large, Volume 51, page 233
League of Nations Treaty Series, Volume 120,
pages 155, 157, 183

Translation by U.S. State Department

The President of the German Republic, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Chile, the President of the Republic of Cuba, His Majesty the King of Denmark and Iceland, His Majesty the King of Spain, the Chief of the Estonian State,* the President of the United States of America, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Possessions Beyond the Seas, Emperor of India, His Serene Highness the Governor of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia,* the President of the Republic of Mexico, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Peru, the President of the Republic of Poland, the President of the Portuguese Republic, His Majesty the King of Rumania, His Majesty the King of the Serbs, Croats, and Slovenes,† His Majesty the King of Sweden and the President of the Republic of Uruguay, (26).

Having recognized the utility of laying down in common accord certain uniform rules relating to bills of lading, have

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* Since 1940, members of the U.S.S.R.

† Now Yugoslavia.

decided to conclude a convention to that effect and have designated as their Plenipotentiaries, namely:

(The list of attending Diplomatic Plenipotentiaries of fourteen out of twenty-six participating States is here omitted. The eighteen Signers of the Convention appear at pages 67 and 70.)

Who, duly authorized therefor have agreed as follows:

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO (OCEAN) BILLS OF LADING

(Translation by the U.S. State Department)

ARTICLE I.—DEFINITIONS.

In this convention the following words are employed with the meanings set out below:

(a) "Carrier" includes the owner of the vessel or the charterer who enters into a contract of carriage with a shipper.

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such instrument regulates the relations between a carrier and a holder of the same.

(c) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) "Ship" means any vessel used for the carriage of goods by sea.

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

ARTICLE II.—RISKS.

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

ARTICLE III.—RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

2. Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identfication of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(c) The apparent order and condition of the goods;

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, it shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV.—RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped, and supplied and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of

paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers, and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint of princes, rulers, or people or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent, or representative.

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy or marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling* per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

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* The First Understanding (p. 77, infra) declares that the corresponding amount shall be $500 lawful money of the United States. See also Article IX, (p. 62, infra); and Section 4 (5) of the Act (p. 8, supra).

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

ARTICLE V.—SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities and liabilities under this convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

ARTICLE VI.—SPECIAL CONDITIONS.

Notwithstanding the provisions of the preceding articles, a carrier, master, or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or concerning his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or concerning the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

ARTICLE VII.—LIMITATIONS ON THE APPLICATION OF THE RULES.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

ARTICLE VIII.—LIMITATION OF LIABILITY.

The provisions of this convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.*

ARTICLE IX.

The monetary units mentioned in this convention are to be taken to be gold value.*

Those contracting states in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.†

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

ARTICLE X.

The provisions of this convention shall apply to all bills of lading issued in any of the contracting States.††

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* See Part III.

* The effect of this provision is nullified for the United States by the declaration of the First Understanding, p. 77, infra.

† Congress has declared the equivalent to be $500 lawful money of the United States. See Section 4 (5) of the Act of April 15, 1936, p. 8, supra.

†† The declaration of the Second Understanding is that in the event of a conflict, the text of the Act of April 15, 1936, shall prevail over the text of the Convention. The Act applies only to bills of lading in foreign commerce; hence the Convention also applies only to foreign commerce of the United States and not to domestic commerce, where its use is optional.

* Not yet (1951) implemented by ratification.

ARTICLE XI.

After an interval of not more than two years from the day on which the convention is signed, the Belgian Government shall place itself in communication with the governments of the high contracting parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said governments. The first deposit of ratifications shall be recorded in a proces-verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

A duly certified copy of the proces-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

ARTICLE XII.

Nonsignatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the convention a duly certified copy of the notification and of the act of

accession, mentioning the date on which it received the notification.

ARTICLE XIII.

The high contracting parties may at the time of signature, ratification, or accession declare that their acceptance of the present convention does not include any or all the self-governing dominions, or of the colonies, overseas possessions, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate, or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or authority.

ARTICLE XIV.

The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the proces-verbal recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with Article XIII, it shall take effect six months after the notifications specified in paragraph 2 of Article XI, and paragraph 2 of Article XII, have been received by the Belgian Government.

ARTICLE XV.

In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all other States informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

ARTICLE XVI.

Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government which would make arrangements for convening the conference.

Done at Brussels, in a single copy August 25, 1924.

Signatures ad referendum: Chile,* Estonia,* France, Germany, Great Britain, Hungary, Italy, Japan,* with reservations, Poland and Danzig, Rumania, Spain, United States of America, Yugoslavia.* The names of the individual signers appear on pages 66 and 68.

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* Not yet (1951) implemented by ratification.

CHAPTER 28—CARRIAGE OF GOODS BY SEA

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§ 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, ch. 229, 49 Stat. 1207.)

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

(Apr. 16, 1936, ch. 229, § 1, 49 Stat. 1208.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

(Apr. 16, 1936, ch. 229, § 2, 49 Stat. 1208).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1303. Responsibilities and liabilities of carrier and ship

(1) Seaworthiness

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) Cargo

The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) Contents of bill

After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper,

issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Bill as prima facie evidence

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of the Act of August 29, 1916, commonly known as the "Pomerene Bills of Lading Act" [49 App. U.S.C. 81 et seq.].

(5) Guaranty of statements

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in

no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Notice of loss or damage; limitation of actions

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery therof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) "Shipped" bill of lading

After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up

any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Limitation of liability for negligence

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

(Apr. 16, 1936, ch. 229, § 3, 49 Stat. 1208.)

REFERENCES IN TEXT

The Pomerene Bills of Lading Act, referred to in par. (4) is act Aug. 29. 1916, ch. 415, 39 Stat. 538, as amended, which is classified generally to chapter 4 (§ 81 et seq.) of Title 49, Appendix, Transportation. For complete classification of this Act to the Code, see Short Title note set out under section 81 of Title 49, Appendix, and Tables.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1304, 1306, 1313 of this title.

§ 1304. Rights and immunities of carrier and ship

(1) Unseaworthiness

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) Freedom from negligence

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Deviations

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Amount of liability: valuation of cargo

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Inflammable, explosive, or dangerous cargo

Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and charac-

ter, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

(Apr. 16, 1936, ch. 229, § 4, 49 Stat. 1210.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1306, 1313 of this title.

§ 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

(Apr. 16, 1936, ch. 229. § 5, 49 Stat. 1211.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1306, 1309, 1313 of this title.

§ 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordianry course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

(Apr. 16, 1936, ch. 229, § 6, 49 Stat. 1211.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1313 of this title.

§ 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

(Apr. 16, 1936, ch. 229, § 7, 49 Stat. 1212.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916 [46 U.S.C. 801 et seq.], or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

(Apr. 16, 1936, ch. 229, § 8, 49 Stat. 1212.)

REFERENCES IN TEXT

The Shipping Act of 1916, referred to in text, is act Sept. 7, 1916, ch. 451, 39 Stat. 728, as amended, which is classified principally to chapter 23 (§ 801 et seq.) of this title. For complete classification of this Act to the Code, see section 842 of this title and Tables.

Section 175 of this title, referred to in text, was repealed by act Oct. 9, 1940, ch. 777, § 7, 54 Stat. 1028.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1313 of this title.

§ 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title: of (c) in any other way prohibited by the Shipping Act, 1916, as amended [46 U.S.C. 801 et seq.].

(Apr. 16, 1936, ch. 229, § 9, 49 Stat. 1212.)

REFERENCES IN TEXT

The Shipping Act of 1916, as amended, referred to in text, is act Sept. 7, 1916, ch. 451, 39 Stat. 728, as amended, which is classified principally to chapter 23 (§ 801 et seq.) of this title. For complete classification of this Act to the Code, see section 842 of this title and Tables.

§ 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

(Apr. 16, 1936, ch. 229, § 11, 49 Stat. 1212.)

§ 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

(Apr. 16, 1936, ch. 229, § 12, 49 Stat. 1212.)

§ 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, ch. 229, § 13, 49 Stat. 1212; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.)

CODIFICATION

A proviso in second sentence of this section that the Philippine Legislature might by law exclude its application to transportation to or from ports of the Philippine Islands was omitted in view of Proc. No. 2695, set out under section 1394 of Title 22, Foreign Relations and Intercourse, which proclaimed the independence of the Philippines.

§ 1313. Suspension of provisions by President

Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

(Apr. 16, 1936, ch. 339, § 14, 49 Stat. 1213, Aug. 6, 1981, Pub. L. 97-31, § 12(146), 95 Stat. 166.)

AMENDMENTS

1981—Pub. L. 97-31 substituted in first par. "Secretary of Transportation" for "Secretary of Commerce".

§ 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

(Apr. 16, 1936, ch. 229, § 15, 49 Stat. 1213.)

§ 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

(Apr. 16, 1936, ch. 229, § 16, 49 Stat. 1213.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "This Act", meaning act Apr. 16, 1936, ch. 229, 49 Stat. 1207, which enacted this chapter and amended section 25 of former Title 49, Transportation. For complete classification of this Act to the Code, see Tables.